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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WRA PROPERTY MANAGEMENT, INC., et al., Cross-Complainants and Appellants, v. ALLAN C. JONES et al., Cross-Defendants and Respondents.	B210563 (Los Angeles County Super. Ct. No. YC054619)

APPEAL from judgments of the Superior Court of Los Angeles County. William G. Willett, Judge. Reversed.

Hart, King & Coldren, Robert S. Coldren, John H. Pentecost, Christopher R. Elliott, Daniel T. Rudderow and Brian P. Kinder for Cross-Complainants and Appellants.

Veatch Carlson, James C. Galloway, Jr. and Dawn M. Oster for Cross-Defendants and Respondents Allan C. Jones and Richard K. Rounsavelle.

Cross-complainant 23560 Madison, L.P. (Madison) leased a commercial office suite to cross-defendants Allan C. Jones and Richard K. Rounsavelle, dentists (Tenants). Tenants sued Madison and its property manager, cross-complainant WRA Property Management, Inc. (WRA), alleging they failed to remediate mold and infestation problems. Madison and WRA cross-complained. The trial court granted Tenants' special motion to strike the cross-complaint (Code Civ. Proc., § 425.16), accepting their assertions that the gravamen of the cross-complaint was protected litigation activity and that cross-complainants failed to establish a probability of prevailing.[1] We reverse the order because the trial court incorrectly determined that the gravamen of the cross-complaint is Tenants' petitioning activity.

BACKGROUND

We obtain the background facts from "'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

Tenants leased an office suite from Madison's predecessor in interest. The lease term ran to 2005, with two five-year options available thereafter. In 2003, Madison purchased the property and assumed the lease. WRA managed the property. In June 2004, Tenants exercised the first five-year option, extending the lease to 2010.

According to cross-complainants, as early as 2003 Tenants intended to breach the lease and obtain new premises for their dental practice. To offset any damages resulting from their intended breach, they hired an attorney who specializes in toxic mold litigation and "endeavored to lay the foundation for an artificial case against their landlord for constructive eviction." Toward that end, from 2003 to 2006 Tenants commissioned

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1 Unspecified statutory references are to the Code of Civil Procedure. Section 425.16 is known as the anti-SLAPP statute, an acronym for strategic lawsuit against public participation. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 71-72, & fn. 1 (*City of Cotati*).)

unneeded inspections for mold, purported to find toxic mold where none existed, made frivolous complaints to cross-complainants about minor problems, sought unneeded service to the heating, ventilation, and air conditioning (HVAC) system, created a false paper trail documenting nonexistent problems, and threatened to vacate the property because of problems with the HVAC system.

Tenants anticipatorily sued Madison and WRA in February 2007 for breach of contract, negligence, nuisance, and intentional infliction of emotional distress, seeking damages, indemnity and declaratory relief.[2] They alleged the building was beset with evils, including mold, a sewer leak, fungus, bees, rodents, and raccoons. They alleged cross-complainants failed to provide habitable premises and constructively evicted them by failing to address or repair the building's problems "except on a superficial and temporary basis," which forced them to move their dental practice to a new location.

In July 2007, Tenants notified cross-complainants they intended to vacate the property. Cross-complainants began negotiations with a potential replacement lessee, but Tenants disparaged cross-complainants and the property to the potential lessee, which caused negotiations to fail.

Tenant vacated the property on October 1, 2007 and stopped paying rent.

In April 2007, cross-complainants filed (and, after Tenants vacated the property, amended) their cross-complaint, ultimately asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud (false promise), intentional misrepresentation, negligent misrepresentation, and conspiracy to commit fraud.[3] In it, they referenced Tenants' above activities, alleging Tenants concealed their intention to breach the lease and, to "offset the costs" of the planned breach, colluded with their attorneys to "build an artificial case" against Madison and lay the foundation for a false constructive eviction claim.

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[2] The record does not indicate whether Madison or WRA challenged the pleading.

[3] It is not clear why WRA joined the cross-complaint, as it does not allege facts indicating it is party to the lease (or any contract) or suffered damages.

Cross-complainants alleged Tenants breached the lease "through the above-described actions." They alleged Tenants breached the covenant of good faith and fair dealing by concealing their intent not to perform when they exercised the first five-year option, "making false and disparaging comments about Cross-Complainant and the Madison Property" to a prospective lessee, and by "acting in the manner alleged herein." They alleged Tenants' exercising the five-year lease option with "no intention of performing their obligations thereunder" constituted fraud. Cross-complainants sought damages for lost rent under the lease and lost opportunity to secure higher rent from another lessee.

Tenants moved to strike the SACC pursuant to section 425.16, arguing the thrust of the SACC was to quell their efforts to petition the courts.

After denying cross-complainants' motions for a continuance and further discovery, the trial court granted Tenants' anti-SLAPP motion, finding the SACC arose from protected activities and cross-complainants failed to establish a probability of prevailing on the merits. The court denied cross-complainants' motion for reconsideration and entered judgments dismissing the SACC and granting Tenants' motion for attorney fees and costs.

Cross-complainants timely appeal the court's rulings on Tenants' anti-SLAPP motion and their own motions for continuance, discovery and reconsideration. They also appeal from the judgments granting dismissal and awarding attorney fees and costs.

DISCUSSION

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§425.16, subd. (b)(1).) "[T]he filing of a complaint is an exercise of the constitutional right of petition and falls under

section 425.16." (*A. F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc*. (2006) 137 Cal.App.4th 1118, 1125 (*Brown*).) Communications preparatory to or in anticipation of the bringing of an action also fall under section 425.16. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.)

The SACC references activity arguably subject to section 425.16 (Tenants' preparations to assert, and assertion of, an "artificial case against" cross-complainants for constructive eviction) as well as activity not subject to section 425.16 (Tenants' failure to pay rent, false promise when exercising the first five-year lease option, and misrepresentations to a prospective third-party lessee). Tenants contend the gravamen of cross-complainants' SACC is activity preparatory to or in anticipation of the bringing of litigation. They contend that activity is privileged under Civil Code section 47, which constitutes a defense to the SACC and precludes cross-complainants from establishing a probability of prevailing.[4] As we explain below, we disagree with Tenants' characterization of the pleading and conclude that the trial court improperly granted their special motion to strike.

A. Standard of Review and the "Arising From" Requirement

We review de novo the trial court's ruling by conducting an independent review of the entire record. (*Brown, supra*, 137 Cal.App.4th at p. 1124.) We independently determine whether the opposing party's complaint against the moving party arises from the moving party's exercise of a valid right of free speech or petition and if so, whether the opposing party has established a probability of prevailing. (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

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[4] Civil Code section 47 provides in pertinent part that "[a] privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding . . . ." "'[C]ommunications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b).'" (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115, citations omitted.)

"Although a party's litigation-related activities constitute 'act[s] in furtherance of a person's right of petition or free speech,' it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute. To qualify for anti-SLAPP protection, the moving party must demonstrate the claim 'arises from' those activities. A claim 'arises from' an act when the act '"'forms the basis for the plaintiff's cause of action' . . . .'" [Citation.] '[T]he "arising from" requirement is not always easily met.' [Citation.] A cause of action may be 'triggered by' or associated with a protected act, but it does not necessarily mean the cause of action arises from that act. (*City of Cotati* [*supra*,] 29 Cal.4th 69, 77-78 . . . .)" (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537 (*Kolar*).)

Thus, "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 92.)

For example, in *City of Cotati*, the Supreme Court held that a special motion to strike should not have been granted in a state court declaratory relief action filed in response to a federal declaratory relief action between the same parties, raising the same issues in connection with the validity of a mobile home park rent stabilization ordinance. The court reasoned that "the actual controversy giving rise to both actions—the fundamental basis of each request for declaratory relief—was the same underlying controversy respecting City's ordinance. City's cause of action therefore was not one arising from Owners' federal suit. Accordingly, City's action was not subject to a special motion to strike." (*City of Cotati*, *supra*, 29 Cal.4th at p. 80, fn. omitted.)

"Similarly, in *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179 . . . , the court determined the anti-SLAPP statute did not apply to a former client's suit against a law firm for breach of loyalty. There, the law firm, which previously represented the plaintiff, represented the plaintiff's opponent in an arbitration proceeding. Although pursuit of arbitration proceedings is a protected activity, the court nonetheless held the breach of loyalty claim did not arise from that activity, reasoning:

'The breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client. . . . In other words, once the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty of loyalty. The breach of fiduciary duty lawsuit may follow litigation pursued against the former client, but does not arise from it. Evidence that confidential information was actually used against the former client in litigation would help support damages, but is not the basis for the claim. . . . [T]heir claim is not based on "filing a petition for arbitration on behalf of one client against another, but rather, for failing to maintain loyalty to, and the confidences of, a client."' [Citation.]" (*Kolar*, *supra*, 145 Cal.App.4th at pp. 1538-1539.)

B. Multiple Factual Theories or "Mixed" Causes of Action

"Where both constitutionally protected and unprotected conduct is implicated by a cause of action, a plaintiff may not 'immunize' a cause of action challenging protected free speech or petitioning activity from a special motion under section 425.16 by the artifice of including extraneous allegations concerning nonprotected activity. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 . . . .) Thus, when allegations of nonprotected activity are incidental or collateral to a plaintiff's claim challenging primarily the exercise of the rights of free speech or petition, they may be disregarded in determining whether the cause of action arises from protected activity. Conversely, if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion. (See *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866 . . . [anti-SLAPP statute does not provide protection to suits arising from any act having 'any connection, however remote, with [protected conduct]'].)" (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414-415.)

"The apparently unanimous conclusion of published appellate cases is that 'where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is "merely incidental" to the unprotected conduct.' (*Mann v. Quality Old Time Service, Inc*. [(2004) 120 Cal.App.4th 90, 103].)" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.)

C. Gravamen of Cross-Complainants' SACC

Applying the foregoing principles, we conclude that a fair reading of the SACC reveals that non-protected activity—failing to pay rent, making a false promise, and making misrepresentations to a prospective third-party renter—and not protected litigation activity, is the gravamen or main thrust of the pleading. Allegations of these activities are not mere surplusage or collateral to the main focus of the lawsuit. By contrast, references to Tenants' preparations to assert, and assertion of, the false defense of constructive eviction are only incidental to causes of action based essentially on nonprotected activity, and could be removed with little or no adverse effect.

Tenants argue that because the SACC is "replete with references" to their discussions with their attorneys, the attorneys' actions in anticipation of litigation, and claims actually asserted in litigation, and "was prompted by, and was the direct result of" their protected activity, the SACC "arises from" the activity. The argument is without merit. For purposes of section 425.16, a claim arises from an act when the act forms the *legal* basis for the cause of action. (*Kolar, supra,* 145 Cal.App.4th 1532, 1537.) Cross-complaints are often prompted by and directly result from preceding litigation. They often reference the preceding litigation extensively. But direct causation by and extensive reference to preceding litigation means the cross-complaint "arises from" the litigation only in a transactional sense, not the legal sense required by section 425.16. Though the SACC repeatedly references Tenants' arguably protected activity, each cause of action depends only on nonprotected activity. That cross-complainants also allege

Tenants falsely asserted constructive eviction in preceding litigation does not shift the gravamen of the SACC claim away from that of Tenants' breach of contract, breach of covenant, and fraud.

Because cross-complainants' causes of action do not arise from protected activity, the trial court erred in granting Tenants' motion to strike. We do not reach the issue whether a probability exists that cross-complainants will prevail on their claims. Because the motion was improperly granted, it follows that the judgments dismissing the SACC and awarding attorney fees and costs cannot stand. (See *Giles v. Horn* (2002) 100 Cal.App.4th 206, 241 [order awarding attorney fees falls with reversal of judgment on which it is based].) We do not address cross-complainants' appeal of orders denying their other motions.

DISPOSITION

The judgments granting dismissal and awarding attorney fees are vacated and the order granting respondents' special motion to strike is reversed. Appellants are entitled to costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.